

No. 20662

United States
COURT OF APPEALS
for the Ninth Circuit

JEDDELOH BROTHERS SWEED MILLS,
INC., a Corporation, OTTO JEDDELOH,
FRED JEDDELOH, *Appellants,*

v.

COE MANUFACTURING COMPANY,
a Corporation, *Appellee,*

and

COE MANUFACTURING COMPANY,
a Corporation, *Appellee and Cross-Appellant,*

v.

JEDDELOH BROTHERS SWEED MILLS,
INC., a Corporation, OTTO JEDDELOH,
FRED JEDDELOH, *Appellants and Cross-Appellees.*

*Appeal from the United States District Court for the
District of Oregon—Civil No. 9702 (Judge Solomon)*

REPLY BRIEF OF APPELLANTS AND CROSS-APPELLEES

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REPLY BRIEF OF APPELLANTS AND CROSS-APPELLEES

Summary of Parties' Basic Positions on Validity

Plaintiff's answer to the defense that claims 3, 5, 7
and 17 are invalid on the merits is that Parker's combina-

tion of old elements is not just an improvement in existing apparatus, but rather for a completely new machine—a veneer feeder.¹ Throughout plaintiff's answering brief the emphasis and sole distinction over the prior art is that Parker produced the first successful veneer feeder. Nowhere in the brief is there any discussion of how the claimed elements function together any differently from the way they always had to produce an unexpected result. Plaintiff's argument never goes beyond general statements of what the Parker machine does and nothing is said about the claimed elements as such. Patentable novelty is predicated solely on the use to which the machine is supposed to be limited, i.e., feeding veneer, rather than some other sheet material.

Defendants' position is that plaintiff was bound under the well-established and very recently reaffirmed law laid down by the Supreme Court, and followed by this Court, to show precisely wherein Parker's combination of old mechanical elements produced an unexpected result. Plaintiff cannot rely on the use to which the machine is put to impart patentable novelty.

The Parker patent is not for a new machine because basically the patent is for a machine that will transfer material in timed sequence to a plurality of decks of a conveyor-type machine. Transfer apparatus of that type was not new with Parker. For instance, some of the prior art patents which disclose such apparatus are Jones 644, 520 (DX 102, II.354); Streeter 1,809,456 (DX 110, II.446); Absmei-

¹ Answering Brief of Cross-Appellant and Appellee (Ans. Br.), pp. 4, 5, 8, 13, 18, 28.

er 1,871,832 (DX 111, II.451); Farley 1,903,102 (DX 112, II.458); Bruner 1,913,533 (DX 113, II.465); Moore 1,949,281 (DX 114, II.480); Absmeier 2,000,269 (DX 116, II.498); Birdsey 2,000,272 (DX 117, II.506); Sekulski 2,058,729 (DX 118, II.514). From these patents defendants singled out the Streeter patent because it had not been cited during prosecution of the original Parker application, and because, when plaintiff made its application for reissue, it admitted that Streeter had everything basically called for by Parker except pinch rolls. Cross 640,368 (DX 101, II.354) and Campbell 1,216,773 (DX 105, II.396) disclosed such pinch rolls for feeding sheet material while maintaining roll stack alignment.

From the foregoing it logically follows that the question of patentable invention is reduced to an inquiry as to whether substitution of the prior art pinch rolls in Streeter for his jump rolls produced any unexpected result in sheet feeding, and whether it would have been obvious to one having ordinary skill in the industry.

Under Supreme Court Decisions Parker Did Not Make a Patentable Invention

Plaintiff embraces *U. S. v. Adams et al*, — U.S. —, 34 LW 4132, 148 USPQ 479, as “a complete answer . . . to defendants’ contention that the Parker combination was not a patentable one.”² Plaintiff’s reliance on the *Adams* case is misplaced because there is no factual similarity between the Adams and Parker patents or

² Ans. Br., p. 4.

between the circumstances surrounding them. Adams involved a significant contribution to the science of electrochemistry. He invented a new battery whose operating characteristics

“... have been shown to have been unexpected and to have far surpassed then-existing wet batteries. Despite the fact that each of the elements of the Adams battery was well known in the prior art, to combine them together as did Adams required that a person reasonably skilled in the prior art must ignore that (1) batteries which continued to operate on an open circuit and which heated in normal use were not practical; and (2) water-activated batteries were successful only when combined with electrolytes detrimental to the use of magnesium. These long-accepted factors, when taken together, would, we believe, deter any investigation into such a combination as is used by Adams.”³

The elements of the Adams battery performed a new function when working in concert—one that was contrary to the teachings of the prior art. Despite the fact that batteries had been the object of considerable experimental work for one hundred and seventy-five years, the prior art did not suggest the combination invented by Adams, and “the Patent Office found not one reference to cite against the Adams application.” When Adams brought his invention to the attention of the government, its scientists “did not believe the battery was workable.” Later they changed their minds, copied the battery, but failed to notify Adams of their changed views and the use to which the government was putting

³ 34 LW at 4135.

the Adams battery. The Adams invention clearly met the tests set forth in the *Hotchkiss* and *A.&P.* cases,⁴ neither of which is mentioned by plaintiff in its answering brief.

Contrasted with Adams, the Parker patent involves an alleged improvement in a combination of old *mechanical* elements. According to plaintiff's witnesses, the key to Parker's invention was using pinch rolls to feed sheets of veneer.⁵ Plaintiff, however, does not deny that the use of pinch rolls to feed other sheet material was old. When Parker employed pinch rolls without any change in their construction or operation to feed veneer he found, unsurprisingly, that they worked.⁶ Parker did not go contrary to the prior art teachings, but followed them to produce the expected result when pinch rolls were combined with the other old instrumentalities.

Plaintiff seeks to make out a case of a long-felt need in the plywood manufacturing industry of a machine for feeding veneer to dryers which was not met until Parker came along. It urges that producers were unwilling to try the patented machine because they didn't believe veneer could be mechanically fed, and that when a machine was finally installed, it worked to the amazement of everyone and was a great success.⁷

⁴ 11 How. 248; 340 U.S. 147.

⁵ I. 143, 144, 145, 285; PX 4, p. 57.

⁶ Pinch rolls were traditionally used on the dryer proper to convey veneer. I.102, 103.

⁷ Plaintiff never showed that any commercial success was attributable to the patented invention. *B & M Corp. v. Koolvent Aluminum Awning Corp.*, D.C. Ind., 1957, 156 F. Supp. 691, affirmed 257 F.2d 264. At best, commercial success is a "weak reed for a patentee to lean upon." *Farr Co. v. American Air Filter Co.*, 9 Cir., 1963, 318 F.2d 500, 504.

parity in standards of patentability applied by the Patent Office and the courts, and pointed to failures of the Patent Office to consider the requirements of Section 103. An examination of the file histories of the original and reissue Parker patents shows failure of such consideration by the Patent Office in the present case. No consideration was ever given by the Patent Office as to whether use of the Cross or Campbell pinch rolls to deliver sheet material to Streeter's multideck dryer feeder was obvious.

Under the Decisions of this Court Parker Did Not Make a Patentable Invention

Plaintiff refers to numerous decisions of this Court and others which have upheld combination patents, and seeks to dispose of some of the Ninth Circuit cases cited by defendants on the grounds that they involved only "a minor change in the construction of an existing apparatus which after the change performed no different function."¹⁰

Under all of these decisions, regardless of the magnitude of mechanical improvement involved, the court examined the interaction of the old, or old and new, elements to determine whether there was anything unusual or surprising produced as a result of their unification. Only if there was such a result was patentable invention found.

A most recent decision by this Court on the question of patentable invention is *Bentley v. Sunset House Dis-*

¹⁰ Ans. Br., p. 18.

tributing Corp., Mar. 25, 1966, — F.2d —, 149 USPQ 152, in which the *Graham* and other pertinent cases are discussed. In determining the obviousness of a combination of old mechanical elements, the Court reaffirmed the traditional test and said at 155:

“In assessing the patentability of combination patents, we are to apply a ‘severe test,’ whether ‘the whole in some way exceeds the sum of its parts’ to produce ‘unusual or surprising consequences from the unification of the elements * * *,’ *A.&P. Tea Co. v. Supermarket Co.*, 1950, 340 U.S. 147 at 152.”

No such test was applied in this case, and no findings were made as to just how the old elements in *Parker* functioned differently in combination from out of it.¹¹ The District Court found that there was patentable invention in the combination because “it was a new method of feeding sheets of green [dry?] and wet veneer into a dryer.”¹²

In *Dallas Machine & Locomotive Works, Inc. v. Wilamette-Hyster Co. et al*, D.C. Ore. 1939, 28 F. Supp.

¹¹ *Bergman v. Aluminum Lock Shingle Corp. of America*, 9 Cir., 1957, 251 F.2d 801, 808.

¹² Finding XXXI. Defendants singled out in their Opening Brief (pp. 19 et seq.) crucial findings XXX, XXXI for discussion. The District Court's other findings concerning what the prior art was and what *Parker* did to improve on it are also clearly erroneous. All of these findings are based on the erroneous factual assumption that runs throughout the Court's opinion and findings that the claims in issue are limited to veneer sheets and that the prior art teachings are limited to feeding of sheet material other than veneer. The *Bergman* case, *supra*, is most pertinent on this point, as well as its discussion of *Stauffer v. Slenderella Systems of California*, 9 Cir., 1957, 254 F.2d 127, relied on by plaintiff at page 22 of its Answering Brief for the statement that validity is a question of fact (see particularly Judge Pope's concurring opinion).

207, affirmed 112 F.2d 623, this Court dealt with a similar attempt to distinguish from the prior art based on the use to which a machine was put. The patent there involved a lumber carrier of the straddle type which was a combination of a self-propelled vehicle and an elevator mechanism. In rejecting plaintiff's argument that straddle carriers "constitute a separate field governed by peculiar principles and that the developments in the art of elevator or front-end carrier construction are not to be considered," Judge Fee, writing in the District Court, said at 210:

"Where a useful principle has been exemplified and belongs to the public domain, no monopoly can thereafter be granted as to that principle. A toy may anticipate a useful industrial device. Where a machine has been invented which works in one material no monopoly can be granted simply because it has been set to work on some different material."

In affirming, this Court made the following two observations which are most pertinent to the present case, 112 F.2d at 626:

"One of the new elements is said to be the rack bar and pinion used to raise the load. While it is true that the prior art does not disclose use of such a rack bar and pinion, the difficulty with the contention is that the claim is not restricted to a rack bar and pinion but covers any and all 'load-lifting means.' The prior art discloses 'load-lifting means', and therefore the claim, as to such element, points to nothing new. The other element claimed to be new, is the automatic means for disengaging the

clutch. While none of the 'straddle-type' trucks in the prior art disclosed such automatic means, as noted above, such automatic means were used on elevators.

* * * * *

"Each of the parts is complete in itself. For example, the clutch performs no new or different function in the 'straddle-type' truck than it does when used in any other machine. Its sole purpose is to control the transmission of power. The same may be said for the other parts. The automatic means for moving the clutch to neutral position, so much relied on here, performs no new or different function when used in a 'straddle-type' truck, than it does when used in Dingee's elevator. Its sole purpose is to disengage the clutch, and it does so, whether used in an elevator, or in the 'straddle-type' truck."

The decisions of this Court that there can be no patentable invention in a new use of an old machine or product, or processing of new material in an old machine are in accord with the well-settled law. *Brown v. Piper*, 1875, 91 U.S. 37, 23 L. Ed. 200; *Powers-Kennedy Contracting Corp. v. Concrete Mixing & Conveying Co.*, 1930, 282 U. S. 175, 75 L. Ed. 278; *Ransome Concrete Machinery Co. v. United Concrete Machinery Co.*, 2 Cir., 1910, 177 F. 413; *Vischer Products Co. v. National Pressure Cooker Co.*, 7 Cir., 1949, 178 F.2d 125; *Alward v. Jordan Marsh Co.*, D.C. Mass., 1954, 120 F. Supp. 580.

plaintiff's own prior art Moore patent, which stated:

"This invention relates to a feeding or conveying apparatus for veneer, wall board, or like sheet material, which is cut from a log or extruded from a Fourdrinier machine in a continuous sheet, and which sheet material is in such a state as to require a drying operation before it can be used."¹⁶

Plaintiff's attempt to limit the asserted claims to veneer is contrary to the clear language of the claims, to the file histories of the patent applications, and to the teachings of its own prior art patent.

Furthermore if, as plaintiff now maintains, claims 3, 5, 7 and 17 must be read to include the word "veneer", the claims are invalid for failure to meet the statutory requirements of distinctly pointing out the invention. 35 U.S.C. § 112 provides in pertinent part:

"The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention."

The claims as worded call for "material in sheet form" which is obviously subject to a broader interpretation than "sheet veneer material" which is the way plaintiff now insists claims 3, 5, 7 and 17 must be read. Plaintiff admittedly changed claims 10, 11 and 14 in the reissue because they were "possibly subject to a broader interpretation."¹⁷ For the same reasons, and for consistency, plaintiff should have amended claims 3, 5, 7 and

¹⁶ DX 114, II. 480, Col. 1, ll. 1-7.

¹⁷ PX 4, p. 57.

17 to specify "veneer" as the sheet material. Since it did not, they are invalid.¹⁸

The Claims in Issue Are Invalid for Overclaiming

Plaintiff avoids coming to grips with this defense simply by saying it is untrue because the addition of pinch rolls to Streeter would not have resulted in the Parker apparatus.¹⁹ There is no discussion or refutation any place in plaintiff's brief of the manner in which the various old prior art elements called for in claims 3, 5, 7 and 17 are applicable to the claims, as shown in detail on pages 28 and 29 of Opening Brief for Appellants and Cross-Appellees. That analysis clearly showed that the only element Parker had different from Streeter was pinch rolls, and that both Cross's and Campbell's pinch rolls were mechanically and functionally the same as the pinch rolls called for in the claims.

The comprehensive opinion in *Holstensson v. V-M Corp.*, 6 Cir., 1963, 325 F.2d 109, emphatically refutes plaintiff and supports defendants' position. The patent in that case was on a record player. All United States manufacturers of such equipment, except defendant, had taken a license under the patent. The claims of the patent called for a combination of record-dropping mechanism and cycling mechanism. The cycling mechanism called for in the claims was the same as that which had been the subject of a prior art patent but the record-

¹⁸ *United Carbon Co. v. Binney & Smith Co.*, 1942, 317 U.S. 228, 87 L. Ed. 232.

¹⁹ *Ans. Br.*, p. 28.

dropping mechanism was new. Although the court found that the record-dropping mechanism was a patentable invention, the claims were held invalid for overclaiming because they were not limited to the record-dropping mechanism. The court said, at 122:

“We come, finally, to the critical question for our decision, namely, will the owner of a patent which, in part, contains patentable invention, be denied recovery from one who clearly infringes the part of the patent which is invention, merely because the patent is not a true combination and claims as part of the invention that which is old and disclosed in a prior patent? We are of the opinion that we must answer in the affirmative. Such a holding appears unfair unless there is a policy of patent law which, in its effect, visits total forfeiture upon a patent which attempts to extend its monopoly to something already patented. There is such a policy.”

In this connection reference should also be made to the recent exhaustive opinion of Judge Rosling in *Ling-Temco-Vought, Inc. v. Kollsman Instrument Corp.*, E.D. N.Y., 1966, — F.2d —, 149 USPQ 168, where the applicable law of overclaiming is thoroughly examined, particularly in footnote 4 of the opinion, in a situation akin to the present one.

Plaintiff's Misquotation Confirms File Wrapper Estoppel

Defendants' argument with respect to construing claim 17 is based on admissions made to the Patent Office, rather than amendments to the claim, during pros-

ecution of the original Parker patent. On page 36 of its answering brief, plaintiff states that under the rules of this Court, there is no estoppel as to interpretation of claim 17 because no amendment was made to the claim itself, citing *Schnitzer v. California Corrugated Culvert Co.*, 9 Cir., 1944, 140 F.2d 275. In quoting from that case, plaintiff omitted certain portions of the original sentence which, if included, give it a different meaning from that sought to be conveyed by plaintiff. The full sentence is hereinafter quoted with the omitted portions italicized at either end of the sentence constructed by plaintiff in its brief:

“While It is the rule in this circuit that admissions made by the applicant to the examiner are not to be used to narrow the scope of his claim unless he has made changes in his application pursuant to the examiner’s suggestions. *Yet the proceedings may be used to aid in construing the claim,* *Warren Bros. Co. v. Thompson*, 9 Cir., 293 F. 745.”

In *Warren Bros. Co. v. Thompson*, 9 Cir., 1923, 293 F. 745, as in *Schnitzer*, this Court considered admissions made during prosecution of a patent application in construing claims, and in both cases the Court concluded that there was no infringement based on such admissions.

When claim 17 is construed in the light of the admissions made to the Patent Office, it cannot be held to cover a machine having fixed infeed rolls like the Jeddeloh machine.

Any conflict there may have existed in the past between various circuits on the extent to which admis-

sions made to the Patent Office may be relied upon in construing a claim were laid to rest in *Calmar Inc. v. Cook Chemical Co.*, *Colgate-Palmolive Co. v. Cook Chemical Co.*, supra, at 4128, where the Court, in construing the meaning of a claim, expressly referred to admissions made in counsel's argument to the Patent Office Examiner during prosecution of the patent in suit.

There is No Reversal of Parts in the Accused Machine as Compared to Parker

As explained in detail on pages 2-12 of Brief for Cross-Appellees and Appellants, the accused machine operates on a different principle and with different mechanisms from Parker. Admittedly the function or purpose of each machine is the same, i.e., to feed sheet material to various decks of a dryer, but this they have in common with the prior art and such equivalence of itself never amounts to infringement.²⁰

The *Bianchi* and *Machine Co.* cases²¹ referred to on pages 34 and 35 of plaintiff's answering brief were situations in which there was true inversion or reversal of parts. That is not the situation in our case because by fixing the infeed pinch rolls in the Jeddelloh machine midway between the top and bottom dryer decks and by pivoting the unitized tipple at that point, sheets are fed directly from infeed to outfeed rolls without excessive up and down deflection of the sheets and without a conveyor. A convenient working height for inserting

²⁰ *Westinghouse v. Boyden Power Brake Co.*, 1898, 170 U.S. 537, 569, 42 L. Ed. 1136.

²¹ 168 F.2d 793; 97 U.S. 120.

sheets into the feeder is constantly maintained. These concepts and the mechanism for carrying them out are distinct departures from the Parker patent.

The Correctness of the Reissue Was and Is an Issue

Contrary to what plaintiff states,²² defendants have always maintained that the Parker reissue patent was invalid because it was defective as a matter of reissue law.²³ The District Court recognized it as an issue and found the reissue to be proper.²⁴ In their Statement of Points on Appeal in the District Court, points 6a-6d, and the Court of Appeals, point 7, defendants raised the issue of a defective reissue for failure to satisfy the statutory requirements.

The propriety of the reissue was passed upon by the District Court and is properly before this Court. The reissue should be held invalid as a matter of law for the reasons urged by defendants in their opening brief, pages 55-61..

The Damages Awarded Were Excessive

Plaintiff argues²⁵ that the statutory reasonable royalty provision indicates only a minimal allowance and that the District Court's allowance was too low because plaintiff suffered damages in a greater amount than such a royalty.

²² Ans. Br., pp. '37 et seq.

²³ IV. 2, 4.

²⁴ III.6; Finding XII(b), III.14; Conclusion II, III.25.

²⁵ Ans. Br., pp. 45 et seq.

This argument is more prevalent than relevant because the stipulation between the parties was that an award would be made based on what a reasonable royalty would be and not on damages adequate to compensate for infringement as provided in 35 U.S.C. § 284.²⁶

The District Court's award of a 5% royalty rate was incorrect and excessive for the reasons urged in defendants' opening brief, pages 64-72.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

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²⁶ IV.158.